

Moore, Tania

From: Frakes, Sandie
Sent: Tuesday, September 7, 2021 7:41 AM
To: Agenda Alerts
Cc: Fikes, Cathy
Subject: FW: Noise Agenda Item.

From: larry mcneely <lmwater@yahoo.com>
Sent: Saturday, September 4, 2021 5:04 PM
To: CITY COUNCIL <city.council@surfcity-hb.org>
Subject: Noise Agenda Item.

Looks like we are enforcing Noise issues. I am right now across from Central Park they are having the Civil War re-enactments super loud cannons. This does not really bother me but will these laws be equally enforced to these or do they get a pass but a homeowner or business will be fined? what about the air show? So it is ok if you benefit but everybody else is subject to enforcement? Careful what you wish for and vote for Hippicrits. If this is passed it must be enforced equally no special permits, no exclusions and no Kings -X.

SUPPLEMENTAL COMMUNICATION

Meeting Date: 9/7/2021

Agenda Item No.: 35(21-112)

Moore, Tania

From: Frakes, Sandie
Sent: Tuesday, September 7, 2021 7:51 AM
To: Agenda Alerts
Cc: Fikes, Cathy
Subject: FW: Comments on Item 35 of the Agenda for 9-7-21 Noise Control
Attachments: Noise Deviation Amend w comments no highlights.pdf

From: David Treiman <dtreiman@earthlink.net>
Sent: Monday, September 6, 2021 1:51 PM
To: CITY COUNCIL <city.council@surfcity-hb.org>
Subject: Comments on Item 35 of the Agenda for 9-7-21 Noise Control

**SUPPLEMENTAL
COMMUNICATION**

To the City Council
From resident David Treiman
September 6, 2021

Meeting Date: 9/7/2021
Agenda Item No.: 35(21-112)

Ordinances for Introduction Agenda item 35. 21-112

Approve for introduction Ordinance No. 4222 amending Chapter 8.40 of the Huntington Beach Municipal Code (HBMC) titled Noise Control relating to the control of unnecessary, excessive, and annoying sounds and protecting noise-sensitive land uses, ensuring land use/noise compatibility, reducing noise from mobile sources, and mitigating noise from construction, maintenance, and other sources Approve for introduction Ordinance No. 4222, "An Ordinance of the City of Huntington Beach Amending Chapter 8.40 of the Huntington Beach Municipal Code Relating to Noise Control."

My Comments:

This is a complex ordinance and a complex problem. There are legal issues and drafting issues. But the most important issue is a policy issue. What types of noise need to be further restricted and what types of noise currently prohibited or restricted should be allowed to increase? The health hazards of noise are not fully understood by most people. The scientific evidence is readily available. Implicit in the decision to approve this ordinance is a decision to allow more or require less noise that the City itself has declared to be harmful. Don't decide until you feel comfortable that you are not increasing the danger. Ask questions. Don't settle for

answers that leave you confused about the central health issue or confused about whether the new procedures give a fair hearing to the people who will be most affected by the noise increases.

8.40.010 Declaration Policy

A. In order to control unnecessary, excessive and annoying sounds emanating from incorporated areas of the City, it is hereby declared to be the policy of the City to prohibit such sounds generated from all sources as specified in this chapter B. It is determined that certain noise levels are detrimental to the public health, welfare and safety and contrary to public interest; therefore, the City Council does ordain and declare that creating, maintaining, causing or allowing to create, maintain or cause any noise in a manner prohibited by, or not in conformity with the provisions of this chapter, is a public nuisance and shall be punishable as such. (2379-7/79)

This is from 1979. During the 1970s governments began to recognize that not enough attention was being paid to the health risks of excessive exposure to noise. Laws were passed and agencies were created. Since then the understanding of the danger of harmful noise has increased and so have the medical studies documenting the medical consequences. The danger is far more than merely being annoyed. In addition, the amount of noise in our society has increased. Unfortunately many people, government officials included, do not give adequate attention to the health risks. Ordinance 4222 addresses a variety of problems. Some changes in the Code will make a significant difference in the effort to control harmful noise. Some of the changes seem to allow some levels of noise currently prohibited. It is your task to question whether the increases are justified and have the health harms been adequately considered.

The changes also address some problems of legislative drafting - unclear or contradictory rules and rules that do not make any sense or might be illegal. The changes fix some problems I have previously reported. But some changes make things worse and some problems are completely ignored. There is no way you can solve these problems at a Council meeting. But you can ask staff to explain what the changes are supposed to do and how they operate to provide a fair system that will actually prevent new threats to public health and how they will eliminate existing threats.

I live next to Adams Ave. directly across from the First Christian Church. From 2008 to 2011 there was a very large construction project, subject to a CUP. During those three years the contractors frequently violated the Noise Ordinance and engaged in construction practices prohibited by the Conditional Use Permit. I filed complaints with Code Enforcement and once, on the advice of the Code Enforcement officer, I reported violation of the Noise Ordinance to the police (construction activities at 3 a.m. disturbing the peace). None of these complaints resulted in any consequences. Since I had taught Local Government Law for almost 30 years, I did some legal research and made an amazing discovery. The City of Huntington Beach could only enforce conditions of approval by revoking the permit, and they would never do that if the actions were those of a contractor. The City of Huntington Beach had no authority to fine for most violations of the Noise Control Chapter. The Code said that the Orange County Health Department had that power (based on annual contracts with the City). The County had discontinued that service around 2003. At first none of the city personnel I told this to would believe me. It took until 2013 for the City Attorney's office to almost completely fix the CUP enforcement problem. MC 1.16.090. It took until 2012 to get the City attorney to submit an amendment to MC 8.40.120 that granted enforcement authority to Huntington Beach officials to enforce the Noise Control chapter. I was shocked to discover that the ordinance included something new - a new permit with one purpose only - to allow certain noise levels that had always been declared a public nuisance and "are detrimental to the public health, welfare and safety and contrary to public interest." 8.40.0100. This is the Noise Deviation permit implement is implemented by 8.40.090(k) and 8.40.130 and 8.40.150.

Huntington Beach had gotten along without a noise deviation permit for more than 100 years. There was no attempt to prove this was necessary. There also was no procedure that required or produced a serious examination of the potential harm. I have not discovered any environmental assessment required by CEQA for any of the Noise Deviation permits granted by the Director. In addition, the new provisions were terribly drafted.

I sent numerous memos to Council members, the City Attorney, and the Planning Department about all the problems I identified. They are long and complex. It is not

your job to solve these problems. But you need to have an idea of the scope of the problems that Ordinance 4222 needs to fix. To provide an overview of the problems with the Noise Deviation Permit I have attached a chart that I sent to city officials identifying many of the problems with the Noise Deviation Permit code sections. I don't expect you to have time to read it but it provides a quick visual sense of the scope of the problem.

At last ordinance 4222 is addressing many of the concerns I raised. I thank Dan Kalmick for communicating my concerns and for making some helpful suggestions. However, some issues are not addressed. Some improvements have problems of their own, often due to the complexity of the problems or problems of English grammar that often create ambiguity.

I have spent years thinking about these problems. I don't expect you to understand them immediately. All I ask of you is that you attempt to understand well enough to ask questions regarding the following section sections:

8.40.090 - Are all these exemptions really necessary and should there be some more limits on the type of noise being allowed?

8.40.130. Should there be a public hearing? How do these steps interact with the CEQA required environmental assessment - What are the goals of each? Does the CEQA assessment occur before, during, or after the steps in 8.40.130? The sequence and timing for the various steps are confusing and require consideration of the deadline for appeal discussed in section 8.40.150.

8.40.15 Can you understand how the hearing requirements in chapter 248 will apply to an appeal from the Director to the Planning Commission? Does CEQA have relevance to this step?

Thank you for your service to the city and its citizens.

David Treiman

Summary of Comments on Ordinance 3940 Problems Annotated w comments no highlights.pdf

SECTION 3. Section 8.40.090 of the Huntington Beach Municipal Code is hereby amended to read as follows:

8.40.090 Special provisions. The following activities shall be exempt from the provisions of this chapter:

- (a) School bands, school athletics and school entertainment events, provided such events are conducted on school property or authorized by special permit from the City;
- (b) Activities otherwise lawfully conducted in public parks, public playgrounds and public or private school grounds;
- (c) Any mechanical device, apparatus or equipment used, related to or connected with emergency machinery, vehicle or work;
- (d) Noise sources associated with construction, repair, remodeling, or grading of any real property; provided a permit has been obtained from the City as provided herein; and provided said activities do not take place between the hours of 8 p.m. and 7 a.m. on weekdays, including Saturday, or at any time on Sunday or a federal holiday;
- (e) All mechanical devices, apparatus or equipment which are utilized for the protection or harvest of agricultural crops during periods of potential or actual frost damage or other adverse weather conditions;
- (f) Mobile noise sources associated with agricultural operations provided such operations do not take place between the hours of 8 p.m. and 7 a.m. on weekdays, including Saturday, or at any time on Sunday or a federal holiday;
- (g) Mobile noise sources associated with agricultural pest control through pesticide application, provided that the application is made in accordance with restricted material permits issued by or regulations enforced by the Agricultural Commissioner;
- (h) Noise sources associated with the maintenance of real property provided said activities take place between the hours of 8 a.m. and 8 p.m. on any day except Sunday or between the hours of 9 a.m. and 6 p.m. on Sunday or a federal holiday;
- (i) Leaf blower shall be governed by section 8.40.095.
- (j) Any activity or equipment to the extent that design regulation thereof has been pre-empted by state or federal laws.
- (k) Noise sources associated with temporary public or private events located on private or public property provided a permit has been obtained from the City as provided herein.

SECTION 4. Section 8.40.120 of the Huntington Beach Municipal Code is hereby amended to read as follows:

8.40.120 Manner of enforcement. The Director of Planning and Building ("Director") or Police Chief and their duly authorized representatives are directed to enforce the provisions of this chapter. The Director or Police Chief and their duly authorized representatives are authorized pursuant to Penal Code section 836.5 to arrest any person without a warrant when they have reasonable cause to believe that such person has committed a misdemeanor in their presence.

Page: 2

Author: David Treiman

Subject: Note

Date: 3/13/2014 1:52:22 AM

But see section 111, enacted after this section, which imposes limits notwithstanding any other provisions of this chapter. However, subsections d and k are amended by the 2012 noise deviation permit. Do they override section 111 but the other exemptions do not? This is terrible legislative drafting.

Author: David Treiman

Subject: Note

Date: 3/13/2014 12:58:00 AM

Herein reference? Subsection, section, chapter, or code. Seems to refer to 130 - herein this chapter. But contrary to k because it has time limits. Also this use was the sole justification given of the need for the noise deviation permit - 24 hour construction. But it does not allow a permit for 24 hour construction, unless this section is made irrelevant by k.

Author: David Treiman

Subject: Note

Date: 3/13/2014 12:55:03 AM

Herein reference? Subsection, section, chapter, or code? Presumably the reference is to section 130 so herein means in the chapter. Is that the consistent user? What about the time restrictions of subsection 090(d) which was also changed by this amendment? If so, why was permit herein added to d?

If the Director or Police Chief and their duly authorized representatives conduct db(A) tests or other noise measurement readings for purposes of enforcement, and the noise level is found to exceed those levels stipulated as permissible in this chapter, the owner or operator of the noise source shall be required to pay the cost of the db(A) tests or readings.

No person shall interfere with, oppose or resist any authorized person charged with the enforcement of this chapter while such person is engaged in the performance of his duty.

SECTION 5. Section 8.40.130 of the Huntington Beach Municipal Code is hereby amended to read as follows:

8.40.130 Permit Process. Applications for a permit to deviate from the provisions herein shall be initiated by submitting an application and data as prescribed by the Director and paying the required fee. The application form will be as directed by the Director and shall set forth all facts regarding the request for deviation including any actions the Applicant took to comply with the provisions of this Chapter, the reasons why compliance cannot be achieved and a proposed method of achieving compliance, if such method exists. The Applicant must demonstrate, at a minimum, the need to deviate from the noise level produces a greater benefit to the community which outweighs the temporary increase in noise level above the requirements of this Chapter. Within 10 days after receipt of a complete application, the Director will notify affected property owners within 300 feet of the alleged/proposed noise source of the application for a permit to temporarily deviate from this code.

A separate application shall be filed for each noise source; provided, however, that several mobile sources under common ownership, or several fixed sources on a single property may be combined into one application.

Upon receipt of said application and fee, the Director may approve, conditionally approve or deny the permit upon finding that the above factors as well as factors included in section 8.40.111 of this Chapter are satisfied. The permit shall become effective five days after action by the Director unless appealed as provided herein.

The Director will provide the applicant as well as the affected property owners notice of decision within 24 hours after the decision is made.

An applicant for a permit shall remain subject to prosecution under the terms of this chapter until a permit is granted.

SECTION 6. Section 8.40.150 of the Huntington Beach Municipal Code is hereby amended to read as follows:

8.40.150 Appeals.

A. Notice of Appeal. A person desiring to appeal the Director's decision shall file a written notice of appeal with the Director within five days after the Director's decision. Notice of appeal shall be accompanied by a fee as set forth in the City's current fee resolution.

Page: 3

Author: David Treiman
Subject: Note
Date: 3/13/2014 1:04:18 AM
As of August 5, 2013, I was told that the Director had not prepared any forms nor had there been any applications. I learned in 2014 that there were applications prior to May 2013.

Author: David Treiman
Subject: Note
Date: 3/13/2014 1:09:08 AM
Why cannot compliance with the code always be achieved by not getting the deviation permit? The language in this sentence comes from the Orange County Variance procedure. Its purpose was not to allow new noise in excess of the limits of the code, but to mitigate hardship where existing noises could not be terminated immediately.

Author: David Treiman
Subject: Note
Date: 3/13/2014 1:06:50 AM
If the factors in this sentence are "at a minimum," does that the facts and reasons mentioned in the previous sentence can be disregarded?

Author: David Treiman
Subject: Note
Date: 3/13/2014 1:14:16 AM
This "balancing test" is nonsensical - what is being balanced against what? Need or benefit? vs. increase in noise? What does this mean, how is it measured? You cannot benefit/incomparable factors? E.g. Justice Scalia's example of nonsensical balance: "It is more like judging whether a particular line is longer than a particular rock is heavy."

Author: David Treiman
Subject: Note
Date: 3/13/2014 1:16:36 AM
See two paragraphs down - Director can grant the permit upon receipt of the application. This is before neighbors must be given notice of the receipt of the application. There is no requirement of a comment period or notice of when comments must be submitted.

Author: David Treiman
Subject: Note
Date: 3/13/2014 1:18:16 AM
The process does not require consideration of the number of other permits granted in evaluating the overall harm to the community. This is contrary to CEQA. There is no requirement of frequency or duration of the the events.

Author: David
Subject: Sticky Note
Date: 3/13/2014 1:19:38 AM
How costly to challenge director's decision? Is it worth it to challenge a single event or is the harm from the cumulative impact of multiple events, which cannot be challenged in an individual proceeding.

Author: David Treiman
Subject: Note
Date: 3/13/2014 1:22:38 AM
See the "factors" in section 111. These are not things that can be "satisfied." These are types of things that may be considered in deciding whether noise disturbs the peace, but are neither necessary nor exclusive factors in making this determination. This requirement is nonsensical.

Comments from page 3 continued on next page

If the Director or Police Chief and their duly authorized representatives conduct db(A) tests or other noise measurement readings for purposes of enforcement, and the noise level is found to exceed those levels stipulated as permissible in this chapter, the owner or operator of the noise source shall be required to pay the cost of the db(A) tests or readings.

No person shall interfere with, oppose or resist any authorized person charged with the enforcement of this chapter while such person is engaged in the performance of his duty.

SECTION 5. Section 8.40.130 of the Huntington Beach Municipal Code is hereby amended to read as follows:

8.40.130. Permit Process. Applications for a permit to deviate from the provisions herein shall be initiated by submitting an application and data as prescribed by the Director and paying the required fee. The application form will be as directed by the Director and shall set forth all facts regarding the request for deviation including any actions the Applicant took to comply with the provisions of this Chapter, the reasons why compliance cannot be achieved and a proposed method of achieving compliance, if such method exists. The Applicant must demonstrate, at a minimum, the need to deviate from the noise level produces a greater benefit to the community which outweighs the temporary increase in noise level above the requirements of this Chapter. Within 15 days after receipt of a complete application, the Director will notify affected property owners within 300 feet of the alleged/proposed noise source of the application for a permit to temporarily deviate from this code.

A separate application shall be filed for each noise source; provided, however, that several mobile sources under common ownership, or several fixed sources on a single property may be combined into one application.

Upon receipt of said application and fee, the Director may approve, conditionally approve or deny the permit upon finding that the above factors as well as factors included in section 8.40.111 of this Chapter are satisfied. The permit shall become effective five days after action by the Director unless appealed as provided herein.

The Director will provide the applicant as well as the affected property owners notice of decision within 24 hours after the decision is made.

An applicant for a permit shall remain subject to prosecution under the terms of this chapter until a permit is granted.

SECTION 6. Section 8.40.150 of the Huntington Beach Municipal Code is hereby amended to read as follows:

8.40.150 Appeals.

A. Notice of Appeal. A person desiring to appeal the Director's decision shall file a written notice of appeal with the Director within five days after the Director's decision. Notice of appeal shall be accompanied by a fee as set forth in the City's current fee resolution.

Author: David Treiman

Subject: Note

Date: 3/13/2014 1:24:15 AM

This is inconsistent with the last sentence of this section which excuses conduct once the permit is granted, without waiting 5 days or for an appeal.

Author: David Treiman

Subject: Note

Date: 3/13/2014 1:27:03 AM

The Director told the council that this does not mean the notice must be received, just issued or sent. Given the short period allowed to appeal in section 150, this ambiguity needs to be resolved. Otherwise a person might not have adequate time to provide written notice of the grounds of the appeal. Also there is no requirement that the Director's findings be made available. Without those findings, it will often be impossible to state the grounds for the appeal.

Author: David Treiman

Subject: Note

Date: 3/13/2014 1:28:53 AM

This is inconsistent with the sentence of the paragraph two prior to this paragraph. That sentence does not provide protection from prosecution until five days after the Director grants the permit or even later if the decision is appealed.

Author: David Treiman

Subject: Note

Date: 3/13/2014 1:31:20 AM

The director only has to issue notice of the appeal by the 24 hour deadline. The appellant must file it with the Director by the deadline. Unless the appellant is guaranteed prompt access to the Director's findings and adequate time to decide whether to pay for an appeal and determine the grounds, this right of appeal is not a fair one.

B. Form of Notice on Appeal. The notice of appeal shall contain the name and address of the person appealing the action, the decision appealed from and the grounds for the appeal. The Director may provide the form of the notice of appeal. A defect in the form of the notice does not affect the validity or right to an appeal.

C. Action on Appeal. The Director shall set the matter for hearing before a hearing officer and shall give notice of the hearing on the appeal in the time and manner set forth in California Government Code Section 65091.

D. De Novo Hearing. The hearing officer shall hear the appeal as a new matter. The original applicant has the burden of proof. The hearing officer may act upon the application, either granting it, conditionally granting it or denying it, irrespective of the precise grounds or scope of the appeal. In addition to considering the testimony and evidence presented at the hearing on the appeal, the hearing officer shall consider all pertinent information from the file as a result of the previous hearings from which the appeal is taken.

E. Decision on Appeal. The hearing officer may reverse or affirm in whole or in part, or may modify the hearing officer's decision that is being appealed. The decision of the hearing officer is final on the date of its decision.

SECTION 7. Sections 8.40.140, 8.40.160, and 8.40.170 are hereby deleted in its entirety.

SECTION 5. All other provisions of Chapter 8.40 not amended hereby remain in full force and effect.

SECTION 6. This ordinance shall become effective 30 days after its adoption.

PASSED AND ADOPTED by the City Council of the City of Huntington Beach at a regular meeting thereof held on the ____ day of _____, 2012.

Mayor

ATTEST: INITIALED AND APPROVED:

City Clerk

Director of Building and Planning

REVIEWED AND APPROVED:

City Manager

APPROVED AS TO FORM:

City Attorney

Author: David Treiman

Subject: Note

Date: 3/13/2014 1:32:44 AM

A common ground for challenging a permit based on findings are flaws in the findings. Without access to the finding and reasonable time to respond, the applicant does not have a fair opportunity to appeal.

Author: David Treiman

Subject: Note

Date: 3/13/2014 1:35:00 AM

Huntington Beach does not have an administrative code dealing with appointment and procedures for hearing officers. The Charter contemplates a hearing officer for administrative citations appointed by the City Manager. There is no charter or code provision for this hearing officer. State law requires measures to protect the independence of the hearing officer. Current practice is for the City Attorney to appoint this hearing officer. There is no authorization for this.

Author: David Treiman

Subject: Note

Date: 3/13/2014 1:39:26 AM

Does this allow the Hearing Officer to grant a permit for reasons not considered by the Director's findings? How does the appellant have a fair appeal if the decision can be based on reasons not previously raised? This section does not say that the Hearing Officer can only consider information previously raised. That is unusual and problematic.

Author: David Treiman

Subject: Note

Date: 3/13/2014 1:44:01 AM

This ordinance does not require the Hearing Officer to consider CEQA requirements. But its sole purpose is to allow noise normally considered to be a public nuisance. CEQA requires de novo review by the City Council. This process might be preempted by CEQA. In addition, the process allows de facto amendment of the Noise Ordinance on an ad hoc basis. This is a legislative function. The Council cannot be cut out of this process.

Lastly, without the right of Council review, the city will have no immunity if the hearing officer violates rights under federal law, including the first amendment, a provision often implicated by noise ordinances.

Moore, Tania

From: Frakes, Sandie
Sent: Tuesday, September 7, 2021 7:51 AM
To: Agenda Alerts
Cc: Fikes, Cathy
Subject: FW: Clarifiction regarding email attachment regarding item 35 for 9-7-21

From: David Treiman <dtreiman@earthlink.net>
Sent: Monday, September 6, 2021 2:39 PM
To: CITY COUNCIL <city.council@surfcity-hb.org>
Subject: Clarifiction regarding email attachment regarding item 35 for 9-7-21

I need to clarify what the attachment to my previous email is.

I attached my annotations describing problems with the Noise Deviation permit that is the current city law as amended in 2012. It did this to illustrate the problems that need to be addressed.

This is not the same the as the proposed changes to the Noise Control Chapter in Ordinance 4222. Several of the problems raised in my attachment are addressed in Ordinance 4222.

Sorry if this caused any confusion.

David Treiman
dtreiman@earthlink.net

**SUPPLEMENTAL
COMMUNICATION**

Meeting Date: 9/7/2021

Agenda Item No.: 35 (21-112)